HIMAT IKTISAS (M) SDN BHD

v.

BETTER SLEEP MARKETING (EAST COAST) SDN BHD

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 12-9-2001]
30 AUGUST 2001

CIVIL PROCEDURE: *Appeal - Notice of - Whether properly served - Whether must be endorsed by court*

The defendant filed a notice of appeal against the order of the Sessions Court granting the prayer of the plaintiff for summary judgment pursuant to O. 26A of the Subordinate Court Rules 1980. The plaintiff however raised a preliminary objection that the notice of appeal was defective as the copy of the notice received by the plaintiff was not endorsed by the court, which implied that it was never filed within the court. The defendant contended that there was no necessity to serve the plaintiff a copy of an endorsed notice as the source of the copy was irrelevant.

Held:

[1] This court's reason for agreeing with the preliminary objection followed by the rejection of the impugned notice of appeal was not because it was served out of time, but due to the defendant's failure to serve the plaintiff with a good notice of the appeal. Even though the plaintiff had been supplied with a copy of the notice of appeal, a good notice of appeal could not have been said to be served as it had not emanated from the court. Hence, the notice of appeal was flawed and the appeal was not competent.

[Appeal dismissed.]

Case(s) referred to:

Ahmad Yahya & Anor v. Ahmad Sulaiman [1972] 2 MLJ 109 ***(refd)***
Asia Commercial Finance (M) Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1988] 1 MLJ 33 ***(refd)***
Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 ***(refd)***
Cheah Teong Tat v. Ho Gee Seng & Ors [1975] 2 MLJ 149 ***(refd)***
Chin Hua Sawmill & Co Sdn Bhd v. Tuan Yusoff Tuan Mohamed [1974] 1 MLJ 58
Gurbachan Singh v. Seagrott & Campbell [1962] 28 MLJ 346 ***(refd)***
Ismail Abdul Hamid v. OSK & Partners Sdn Bhd [1997] 1 CLJ 583 ***(refd)***
Lee Lan v. Lim Yoon Loy [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 ***(refd)***
Liew Chee Tat v. Lok Moon & Ors [1972] 2 MLJ 29 ***(refd)***

Lim Yoon Loy v. Lee Lan [1990] 2 MLJ 425 ***(refd)***
Soh Keng Hian v. International Assurance Co Ltd [1996] 2 CLJ 449
Tan Ting Kok v. Cheong Lep Keen & Anor [1969] 1 MLJ 153 ***(refd)***
Tong Ah Seng & Anor v. Chan Swee Lan [1985] 1 MLJ 85 ***(refd)***
Vong Ban Hin v. Laksamana Realty Sdn Bhd [1996] 4 CLJ 852 ***(refd)***

Legislation referred to:
Federal Constitution, art. 121(1)
Subordinate Court Rules 1980, O. 2 r. 1, O. 26A, O. 49 rr. 2(1), (3), (6), 6(1), (2)

For the appellant - Wan Jawahir Harun; M/s Wan Jawahir & Co
For the respondent - Zainal Abidin Mustaffa; M/s Zainal & Mariani

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar J:

Even though this case has a chequered history, going all the way back to 1998 when it was initially filed, suffice if I merely divulge the tail-end facts of this case. The relevant portion, which sufficiently reflects the matter at hand, started off with the order of the Sessions Court granting the prayer of the plaintiff for summary judgment pursuant to O. 26A of the Subordinate Courts Rules 1980 (hereinafter referred to as SCR 1980). That order was obtained on 3 April 2001. Being aggrieved the defendant filed a notice of appeal. Came the hearing of the appeal the plaintiff posed a preliminary objection, on the ground that there was no proper appeal before the court to consider. The plaintiff asserted that the notice of appeal served on it was defective, as the prerequisites of the SCR 1980 had not been adhered to.

The plaintiff canvassed that under O. 49 of the SCR 1980, the aggrieved party must file and serve the notice of appeal within 14 days of that decision date, in this case by 17 April 2001. It further submitted that that notice must be filed with the relevant subordinate court where the decision emanated from, as per O. 49 r. 6(2) (P.U.A 343). The registrar of that court will then extend a copy of the notice of appeal to the registrar of the High Court. It was from this point onwards both parties took cudgel and interpreted the provisions differently.

According to the plaintiff, even though the registrar of the Subordinate Court had received the notice of appeal within time, no endorsement was ever made on the copy of the notice received by it, with the date of filing. Without that characteristic court endorsement imprinted, it implied that the notice of appeal received by the plaintiff was never filed with the courts, but instead had emanated directly from the firm of the appellant or from some other source. The plaintiff contended that a serious shortfall in the legal demands of the law, in the circumstances of the case, had thus occurred.

The defendant on the other hand ventilated that due to the nature of the case and provision related to it, there was no necessity for it to serve a copy of an endorsed notice to the plaintiff. What it did was ample and within the ambit of the relevant provision. As far as it was concerned, only a notice of appeal was to be filed with the competent court within the stipulated time, with a copy subsequently to be extended to the registrar of the High Court. The source of the copy to be served was irrelevant. If all these prerequisites had been complied with, then the appeal before the court was competent. Despite this interesting but simple approach, I rejected the defendant's stance and allowed the preliminary objection, followed in its wake by the consequential order of dismissing the appeal with costs. I now supply my brief reasons for allowing that preliminary objection.

The source of the law as regards the matter at hand emanates from art. 121(1) of the Federal Constitution, which lays down the jurisdiction and powers of the inferior courts. Appeals lie with the High Court. Zeroing into specifics, O. 49 r. 6(2) of the Subordinate Court Rules 1980 is pertinent for the purpose of this case, as it lays down the ground rules for decisions that emanate otherwise than from a full trial. Prior to the amendment of O. 49 r. 6 by PU(A) 193/1993 an appeal could only lie against a final decision (*Vong Ban Hin v. Laksamana Realty Sdn Bhd* [1996] 4 CLJ 852). With the latter amendment, decisions that are interlocutory in nature are now appealable. This observation is made as sub-r. (1) of r. 6 has distinguished decisions made after trial (which no doubt means a full trial) and those, which are not (interlocutory in nature).

For analogy purposes I need to touch briefly on the procedures to be undertaken by an aggrieved party who desires to appeal pursuant to a decision from a full trial. It cannot escape being subject to the all the provisions preceding O. 49 r. 6(1). A notice of that intention to appeal must be filed *vide* Form 140.

Pursuant to O. 49 r. 2(1), the registrar of the subordinate court where at the notice has been filed, shall send a copy of such notice of appeal with the filing date endorsed thereon, to the registrar of the High Court (*Ismail bin Abdul Hamid v. Osk & Partners Sdn Bhd* [1997] 1 CLJ 583). Harun Hashim SCJ in *Lee Lan v. Lim Yoon Loy* [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 as regards the phrase "the date endorsed thereon" had occasion to opine when he stated:

> What to serve: Order 49 r. 2(3) of the SCR provides that the notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. It follows **that the notice to be served** on the respondent under O. 49 r. 2(6) **must show the date** on which the notice of appeal was filed in the court appealed from (emphasis added).

At p. 421 His Lordship concluded:

> The 1991 amendment has now put the position beyond dispute. The correct procedure then is this:
>
> a) first, file the notice of appeal in the court appealed from within 14 days from date of the decision;
>
> b) next, **serve a copy of the notice of appeal showing the date on which it was filed in court,** on the respondent or his solicitor, also within 14 days from date of decision (emphasis added).

As provided for under O. 49 r. 2(3) and discussed by Harun Hashim SCJ, the notice of appeal must be filed within 14 days from the day on which the decision was pronounced.

Order 49 r. 2(6) requires that the appellant shall serve the notice of appeal **within the time limited for the filing of appeal,** on all parties directly affected by the appeal or their respective solicitors. It must mean by interpretation that the service must also be completed within 14 days from the date on which the decision was pronounced (*Ahmad bin Yahya & Anor v. Ahmad bin Sulaiman* [1972] 2 MLJ 109). In the event the notice is yet to be served within the given time, an application for extension of time will be the next course of action.

Returning to the current facts, with O. 49 r. 6(2) being the provision applicable for appeals flowing from interlocutory matters, I herewith reproduce it:

> 6.
>
> (1) ...
>
> (2) The appeal shall be brought by filing a notice of appeal in Form 140 in the registry of the relevant subordinate court, with a copy extended to the registry of the High Court, within 14 days from the date on which the decision was pronounced and serving a copy of the notice on every other party to the proceedings.

To simplify the above provision, in the event the appellant desires to appeal against an interlocutory decision:

1. a notice of appeal must be filed in Form 140;
2. that notice must be filed within 14 days from the date on which the decision was pronounced;
3. the filing must take place in the registry of the relevant subordinate court;

4. a copy of such notice of appeal has to be extended to the registry of the High Court within 14 days from the date on which the decision was pronounced; and

5. a copy of the notice of appeal is served on every other party to the proceedings.

A scrutiny of the provisions pertaining decisions made after trial, and those not made after trial, show certain dissimilarities. Pursuant to O. 49 r. 2(1), a copy of such notice of appeal with the filing date endorsed, shall be sent by the registrar of the subordinate court to the registrar of the High Court. On the other hand under O. 49 r. 6(2) a copy of that notice is merely extended to the registry of the High Court, and not sent to it. In fact the amended latter provision is silent as to the identity of the person, or upon whom the responsibility lies, to extend the notice.

Prior to the amendment of the current provision of O. 49 r. 6(2) *vide* P.U(A) 343, read together with O. 49 r. 2(3), an appellant pursuant to an interlocutory decision, had to serve a copy of the notice on every other party to the proceedings within the time limited ie, 14 days. Unfortunately, under the current O. 49 r. 6(2) the period of service has been dropped. It is trite that if no time limit is stipulated, the service of the notice of appeal must be done within a reasonable time (For purposes of analogy see *Tong Ah Seng & Anor v. Chan Swee Lan* [1985] 1 MLJ 85).

Further on this point of service, it would have been improbable for the aggrieved party to serve the notice of appeal within the 14 days period, if the appellant were to file the notice of appeal on the fourteenth day. An appellant also has to consider the factor of administrative delays in the registry at the stage of that filing, making it impossible for service to take place within fourteen days, after the impugned decision has been pronounced. Regardless of the actual reason, it must have been based on some of these reasons that no fixed number of days have been legislated for purposes of service (*Liew Chee Tat v. Lok Moon & Ors* [1972] 2 MLJ 29).

To wind up on this poser, the burden is on the appellant to explain subsequently, whether the length of time taken to serve that notice was reasonable or not. What is reasonable will certainly depend on the facts of each case. In *Tong Ah Seng & Anor v. Chan Swee Lan (supra)*, even though there was no limit required for the service of the notice on the respondent's solicitor (subject to the facts there), VC George J viewed that a period of 37 days taken to serve that notice was, in the circumstances of the case, unreasonable. Guided by the same rationale of Harun Hashim SCJ, unless the endorsement is there, no court, respondent or any interested party will be able to know whether the service has been made within a reasonable period or not.

To reiterate, the reason for my agreeing with the preliminary objection followed by the rejection of the impugned notice of appeal was not because it was served out of time, but on the premise of the failure of the defendant to serve the plaintiff with a good notice of appeal. Even though the plaintiff had been supplied with a copy of the notice of appeal, the fact that it had not emanated from the court, a good notice of appeal could not have been said to have been served (*Tan Ting Kok v. Cheong Lep Keen & Anor* [1969] 1 MLJ 153). That being so no service had taken place.

Under O. 2 r. 1 non-compliance with the Rules is treated as an irregularity unless the breaches are fundamental (*Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors* [1988] 1 MLJ 33; *Asia Commercial Finance (M) Berhad v. Kimden Housing Development Sdn Berhad* [1993] 1 CLJ 487). It is trite law now that filing the notice of appeal by itself is insufficient as that notice must be served (*Liew Chee Tat v. Lok Moon & Ors* [1972] 2 MLJ 29; *Cheah Teong Tat v. Ho Gee Seng & Ors* [1975] 2 MLJ 149). Even though Abdul Malek J (as His Lordship then was) in *Lim Yoon Loy v. Lee Lan* [1990] 2 MLJ 425 said that non-service was an irregularity, yet agreed on the conclusions of the later cases on the ground that:

> That the court had, accordingly and to my mind rightly, dismissed the appeal purely upon the preliminary objection that there had been no service of the notice of appeal ...

To put it succinctly an appeal effectively comes into existence after service has been complied with. One without the other will not satisfy the strict legal requirements demanded by the SCR 1980 (*Soh Keng Hian v. International Assurance Co. Ltd* [1996] 2 CLJ 449; *Gurbachan Singh v. Seagrott & Campbell* [1962] 28 MLJ 346). For the sake of completeness and analogy, permit me to reproduce the remarks of Ali FJ in *Chin Hua Sawmill & Co Sdn Bhd v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 when he said:

> ... The mere filing of the notice is not sufficient compliance with r. 13. It must be served on respondent as required by r. 7 and failure to do so within one month precludes the applicant from appealing unless special leave of the full court is given under r. 13.

Admittedly the current O. 49 r. 6(2) is silent as to the endorsement requirement, but it could not be denied that this endorsement will indicate its source. The premise of my conclusion is in consonant with the beaten path undertaken by Harun Hashim SCJ in the above case of *Lee Lan v. Lim Yoon Loy (supra)*. As in the latter case, even though O. 49 r. 2(6) is silent as to the endorsement, His Lordship did not hesitate to decide of its requirement.

What then, a practitioner may ask if the aggrieved party serves an unendorsed notice of appeal but attached to it a photostated copy of an endorsed notice, thus sufficiently supplying information as to whether it was filed within time, and simultaneously indicating the period prior to the service? Apart from the above reasons pursuant to the legal prognosis, it must be noted that, after taking a retrospective introspection of the relevant O. 49 r. 6(2), an aggrieved party is required to file "a" notice of appeal in the relevant subordinate court, in the event it wishes to initiate the appeal. Reading further, particularly on matters connected to service, the phrase "serving a copy of the notice" is adverted to, instead of "serving a copy of a notice". By alluding to the phrase "the notice of appeal" a specific document has been identified. With that point of reference known, the only conclusion is that "the notice of appeal" to be served by the appellant must be a notice of appeal that had been filed and endorsed with a date of filing by the registrar (O. 49 r. 2(6) read together with r. 2(1)). Had Parliament under the latter provision, wanted that the aggrieved party serve "a copy of a notice" on every other party to the proceedings, only then can the defendant's view prevail. Only then too may an aggrieved party serve a notice of appeal without scant regard of the endorsement, and for the court also to discount the source.

With the above prognosis and conclusion, there was no alternative left but to declare that the notice of appeal was flawed, hence my pronouncement that the appeal was not competent.